No. 13892

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division

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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [I 42-43][1] The district court made no specific findings of fact. These were waived. No reasons were stated by the court

[1] **Numbers appearing herein within brackets preceded by a Roman numeral I refer to the pages of the typewritten transcript of the record filed by the clerk of the United States District Court; when preceded by Roman numeral II the figures appearing within brackets refer to the stenographer's transcript of the proceedings at the trial.**

in writing for the judgment rendered. The judge of the court declared orally that the motion for judgment of acquittal was denied. He made no discussion of the principles of law involved in the case. [II 271]

The trial court found the appellant guilty. [II 271] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [II 2-3] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [I 44-45]

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act. It was alleged that, after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about July 21, 1952, appellant did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [I 2-3] Appellant was arraigned and pleaded not guilty. [I 4] He waived the right of trial by jury and the findings of fact and conclusions of law. [I 5-6]

Appellant subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the act. [I 8-9] The Government moved to quash the subpoena. [I 8-9] An order to show cause was issued to show whether or not the subpoena should be quashed. [I 18] The trial court overruled the motion to quash and ordered the Government to produce the secret investigative report. [I 18] At the trial the court privately inspected the FBI report and held it to be immaterial to any issue and refused to admit the document in evidence. The court ordered the report sealed and prohibited appellant's counsel from seeing the exhibit. [I 35; II 77-78, 81, 141-142, 246-248, 249-253]

Motion for judgment of acquittal was made. [I 29-34; II 271] The motion for judgment of acquittal was denied. [I 38; II 271] A motion for new trial was filed. [I 39-40] The motion was denied. [I 41; II 274] The appellant was sentenced to serve a period of four years in the custody of the Attorney General. [I 42-43; II 277] Notice of appeal was timely filed. [I 44-45] The transcript of the record, including statement of points relied upon, has been timely filed in this Court.

THE FACTS

Appellant was born August 13, 1931. (1)[2] Tomlinson registered with his local board on October 18, 1949. (2, 3) A classification questionnaire was mailed to him on September 1, 1950. (3, 4)

Tomlinson properly filled out the questionnaire. He gave his name and address. (5) In Series VI he stated that he was a minister. He also said he regularly served as such and that he had been a minister of Jehovah's Witnesses since July 6, 1941. He stated that he had been formally ordained on July 6, 1941, at Millville, New Jersey. (6, 12-13)

He explained extensively about his method of preaching and teaching and about the organization that he represented. He also showed that he was ordained publicly through a formal ceremony. (12-13) He showed that, while he was engaged in secular work, his secular work was not his vocation but his ministry was his vocation. (14) He submitted a certificate of ordination. (15)

In the questionnaire he also showed that he was not married. He showed that he supported himself by secular employment as a baker. He gave Walter Boie Pies as his employer. (7-8) In Series X he showed that he had received elementary education and junior high school training. He also said he attended high school for a period of two years.

[2] **Figures appearing in parentheses refer to pages of the draft board file, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom and the numbers are circled.**

(9) He signed the certificate at the end of questionnaire showing that he was a conscientious objector and requested the special form for conscientious objector. (10) He claimed classification as a minister in Class IV-D. (10)

He filed the special form for conscientious objector that had been mailed to him by his local board. In Series I (B) he certified that he was opposed to both combatant and noncombatant military service. (20) He showed that he believed in the Supreme Being and that this belief carried with it obligations superior to those owed to the state. He showed that Jehovah God and Christ Jesus were recognized by him as the Supreme Powers. He explained this extensively. (20, 24-25) He also showed clearly how it was and when it was that he became a conscientious objector. He showed that his parents had reared him as one of Jehovah's Witnesses and since the age of nine he had been convinced that the belief of Jehovah's Witnesses was the right way.

He showed that his primary source of his objections was the Bible and the Watchtower publications. (21) He showed that he relied on Jehovah God as the one primarily responsible for his guidance. He said that he did this through the Word of God. (21) He explained that normally he did not believe in the use of force but he did believe it was proper to defend himself and his spiritual brothers. (21, 27)

He showed that his behavior in his life had been consistent with his conscientious objections and he always strove to conform to the commandments of Jehovah, the Almighty God. (21) He stated that he had repeatedly given expression, both publicly and privately, to his friends and others about his conscientious objections. (21) He listed the names and addresses of the schools that he attended. (21) He gave the list of his employers. (21) His places of residence were listed. (22)

He gave the names of his parents and showed that their religious beliefs were those of Jehovah's Witnesses. (22)

Tomlinson showed that he had never been a member of

a military organization. (22) He showed that he was a member of the organization known as Jehovah's Witnesses. (22) He pointed out that the Watchtower Bible and Tract Society of Brooklyn, New York, was the legal governing body of Jehovah's Witnesses. He showed that he had become a member of the organization by baptism. (22, 24-25)

He gave the address of his church. (22) He showed that Shield Halvajian was the presiding minister of the congregation. (22) He described extensively in a letter his position as a conscientious objector. He showed that he was entirely neutral toward the affairs of this world. He showed that he followed in the footsteps of Jesus who commanded him to keep himself separate and apart from the world. He showed that Christ Jesus commanded him as a Christian follower not to be spotted by the affairs of this world. (22, 24-28)

He then showed that he had no relationship with any other organization of any kind or character. (22) He attached to his conscientious objector form a booklet entitled "Neutrality" and a magazine entitled "Awake!" (27) In addition to this he filed with the local board, along with the conscientious objector form, a statement by his parents, who were Jehovah's Witnesses. They certified that they had trained Tomlinson in the way that he should go since childhood. They reviewed his study at home and also the fact that he had been trained in the Theocratic Ministry School. They then pointed out that he had been duly trained for the ministry and was ordained in 1940. They showed too that since the date of his ordination he had been an active minister. They requested the board to classify Tomlinson as an ordained minister. (29-30)

Accompanying the conscientious objector form also was an affidavit signed by Shield Halvajian. (31-32) This material was received by the board and filed on September 18, 1950. (11)

On October 30, 1950, the local board classified Tomlinson in Class I-A. (11) He was notified. (11) He then wrote the

local board for a personal appearance. (32) On November 15, 1950, the local board commanded him to appear on November 17, 1950. (34) This was canceled and the date of appearance postponed. (11) Tomlinson appeared before the local board on November 20, 1950. (11)

Tomlinson attempted to testify upon his trial that he was denied his rights to discuss his classification, point out material in the file that had been overlooked and submit new and additional evidence. The trial court erroneously denied Tomlinson the right to show that he had been deprived the right of procedural due process. [II 181-192] He attempted to give testimony about the prejudice on the part of the members of the local board. This evidence was objected to and some of his testimony was stricken. [II 194-195]

The records of the local board show that the personal appearance was conducted on November 20, 1950. The memorandum shows that Tomlinson attempted to give evidence before the local board. The memorandum shows explicitly that "the local board feels that he does not qualify for such a classification, inasmuch as there has been no Theological training in a school, or background which would make him a minister. They feel that a minister is one who has a regular following, and is ordained." (35) The memorandum shows that prejudicial remarks were made by members of the local board. (35)

The local board, upon personal appearance, reopened appellant's case as required and thereafter, on reconsideration, placed him in Class I-A. This was the original classification that had been given to him on October 5, 1950. (11, 35) He was notified of this classification on November 27, 1950. (11) Tomlinson duly appealed from the classification in writing. (36)

Thereafter, he wrote a letter to the appeal board, constituting his appeal statement. In this letter he complained to the board of appeal that he had been denied his rights to procedural due process before the local board upon personal

appearance. (37, 38) He then attempted to argue and explain his conscientious objections. (38-39) He then reiterated he had been denied his right to give any evidence upon the personal appearance. (40) He attached various references from documents showing that he was a minister of religion and entitled to proper consideration by the local board. (41-46)

The local board then sent to Tomlinson a form requesting him to give evidence as to his dependence. He filled this out properly and returned it to the board. (47-49) The local board then on March 1, 1951, reviewed his case again and stated that there would be no change in his I-A classification. The note shows his case was forwarded to the board of appeal. (11) He was notified of this order. (11, 51)

The local board then ordered him to report for a preinduction physical examination. (11, 52) He was found to be physically acceptable. (11, 53) The case was then forwarded to the board of appeal. The board of appeal then preliminarily determined that he was not entitled to classification as a conscientious objector which required that the file be forwarded to the Department of Justice for appropriate inquiry and hearing. (11) The board of appeal then forwarded the file to the Department of Justice for the procedure prescribed by the statute. (54)

There was then an investigation by the FBI before the case was referred to the hearing officer of the Department of Justice. [II 35, 37, 116-117, 132] The file was thereafter put in the hands of Nathan O. Freedman, Hearing Officer of the Department of Justice, for a hearing attended personally by the appellant. Tomlinson was commanded to appear before the hearing officer and he did appear for hearing.

The hearing officer had previously read the FBI secret investigative report. [II 51] He told Tomlinson that he had the FBI report before him. [II 58] He did not, however, show the reports to Tomlinson. [II 58] During the personal appearance he read excerpts from the FBI report that were

adverse and unfavorable to Tomlinson. [II 58-59] Whether the parts he read from the FBI report were fair and adequate was not definitely established by the hearing officer. [II 75-76] While Tomlinson made no requests for the names of the informants and did not know that there was an FBI report before the hearing officer, he did the best he could by showing his background in life as a conscientious objector. [II 99]

Tomlinson had received a notice from the hearing officer that he could request adverse and unfavorable evidence. [II 70-71]

Upon the trial the hearing officer was a witness. He said that in every case where there was adverse information he always told the registrant that he had the FBI report before him and attempted to summarize the unfavorable evidence appearing in the FBI report. [II 137]

In due course of time the hearing officer made a report to the Department of Justice. In his report he showed that Tomlinson sincerely believed that his participation in war was contrary to the laws of God. He showed that Tomlinson believed that laws of God were above the laws of man. He reviewed the Scriptural explanation made by Tomlinson that he was in the world but not a part of it. He put emphasis upon the fact that Tomlinson resisted the idea of being taken away from his preaching work, contrary to the laws of God. The hearing officer then concluded that Tomlinson was like all others of Jehovah's Witnesses. He found Tomlinson to have the same belief as all others of Jehovah's Witnesses. He did mention, however, that, like other Jehovah's Witnesses, Tomlinson believed he had the right to defend himself but he believed it was wrong to kill. (58-59)

The hearing officer then concluded that, notwithstanding the sincere objections of Tomlinson, the hearing officer felt that "he could render great assistance to our government in some other capacity." The hearing officer then recommended that Tomlinson be put into the army as a conscientious objector to combatant service and be required to

render noncombatant military service. He recommended a I-A-O classification. (58-59)

The board of appeal then classified Tomlinson on April 30, 1952, as a conscientious objector to combatant service and ordered him to be inducted into the army as a noncombatant soldier. He was placed, therefore, in Class I-A-O. (11) The local board notified Tomlinson of the appeal board classification on May 7, 1952. (11)

He filed a letter with the board requesting a stay of induction because he was appealing for further review. (60, 61-67) However, on July 1, 1952, the local board ordered the appellant to report for induction on July 18, 1952. (11, 68, 87) Tomlinson reported for induction on July 21, 1952. He refused to submit to induction. (11, 85, 86)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the government. He showed that his beliefs were not the result of political, philosophical, or sociological views but that they were based solely on the Word of God. (10, 20-25)

He attached documents to his conscientious objector papers fully showing his status. (27, 29-32)

The local board denied the conscientious objector status to Tomlinson. He was placed in Class I-A. (11) Following a hearing upon personal appearance he was again placed in Class I-A (11, 35)

On an appeal to the board of appeal his case was referred to the Department of Justice for appropriate inquiry and hearing. (54) A secret investigation was conducted by the FBI and a report thereof placed in the hands of the

hearing officer. [II 35, 37, 116-117, 132] Tomlinson was called for hearing. The hearing officer recommended that Tomlinson be classified as a conscientious objector but that he be required to render noncombatant military service in the armed forces. (58-59)

The board of appeal followed the recommendation and denied the full conscientious objector status to Tomlinson. He was placed in Class I-A-O. (11) In the motion for judgment of acquittal appellant contended that the recommendation of the Department of Justice and the classification by the board of appeal were arbitrary, capricious and based on artificial standards and that the denial of the conscientious objector status was without basis in fact. [I 31]

The motion for judgment of acquittal was denied. [I 38] In the motion for new trial complaint was made of the denial of the motion for judgment of acquittal. [I 39-40]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

Appellant claimed classification as a minister of religion as well as classification as a conscientious objector. (6-13) He showed by evidence that he was engaged in the ministry as his vocation. (13-15) The memorandum made by the local board expressing the reasons for the denial of the ministerial claim shows that he was denied a full and fair hearing upon the ministerial claim. The memorandum stated that since Tomlinson had not attended a theological school he could not be considered a minister. (35) The local board, following the personal appearance, denied the ministerial classification on November 20, 1950. (35)

In his motion for judgment of acquittal appellant complained that he had been denied a full and fair hearing upon

his claim for classification as a minister of religion because the board applied arbitrary, capricious and artificial standards in considering his claim. [I 29-30]

In the motion for new trial complaint was made of the denial of motion for judgment of acquittal. [I 38, 39-40]

The question presented here, therefore, is whether or not upon his personal appearance appellant was denied a full and fair hearing upon his ministerial claim because the local board thought that he did not have a proper background and training for the ministry, inasmuch as he had not attended a theological seminary.

III.

The secret FBI investigative report was in the hands of the hearing officer at the time of the hearing. [II 35, 37, 116-117, 132] While Tomlinson did not make the request to be given a summary of the FBI report, either before or at the hearing, the hearing officer testified that it was always his uniform practice to make and give a summary of the adverse information appearing in the FBI report when the registrants appeared before him for a hearing. [II 137]

During the personal appearance of appellant before the hearing officer he read excerpts to Tomlinson from the FBI report that were considered by him to be adverse and unfavorable. [II 58-59] Tomlinson had no way to test whether what the hearing officer read to him was a fair and adequate summary. [II 75-76]

Complaint was made in the motion for judgment of acquittal that the failure to give all the adverse evidence to appellant that appeared in the FBI report denied appellant due process of law. [I 33] Complaint was made in the motion for new trial about the denial of the motion for judgment of acquittal. [I 38, 39-40]

The question presented, therefore, is whether appellant was denied a full and fair hearing upon the hearing before the hearing officer by not being given a full and adequate summary of the FBI report.

IV.

The conscientious objector claim of appellant was forwarded to the Department of Justice for appropriate inquiry and hearing. (54) A complete investigation was made by the FBI before the case was referred to the Department of Justice for the hearing. [II 35, 37, 116-117, 132] At the hearing the hearing officer had the secret FBI report before him and told Tomlinson that he had it. [II 58]

The hearing officer had previously read the secret FBI investigative report. [II 51] During the personal appearance he read excerpts from the FBI report that were adverse and unfavorable to Tomlinson. [II 58-59] There was no way whereby Tomlinson could determine whether a fair and adequate summary of the adverse evidence in the FBI report was being given to him. [II 75-76]

While Tomlinson did not request the hearing officer to give him a summary of the adverse information in the FBI report the hearing officer testified that in every case where there was any adverse evidence whatever appearing in the report he always made it a practice to summarize the unfavorable evidence and to give it to the registrant at the hearing. [II 137]

At the trial appellant subpoenaed the FBI report. The Government moved to quash the subpoena. The motion to quash was denied. [I 8-9, 14, 18] The FBI reports were produced for the private inspection of the court. The court ordered the FBI reports sealed as exhibits and marked for identification. [I 21; II 24-25, 26, 39, 121, 246-248, 249, 252-253]

The appellant was denied the right to use the FBI reports to determine whether the hearing officer had given a fair and adequate summary of the adverse information appearing in the FBI report.

The question presented here, therefore, is whether appellant was denied his right to have the use of the FBI report upon the trial to test and determine whether the summary made by the hearing officer was fair and adequate,

as he had a right to do and which right is guaranteed by the due process clause of the Fifth Amendment, the act and the regulations.

V.

At the trial Tomlinson attempted to give testimony for the purpose of showing that he was denied the right to a full and fair hearing upon personal appearance by the local board at the hearing when it denied him the right to discuss his classification, point out material in the file that he believed had been overlooked and submit new and additional evidence. The trial court erroneously excluded evidence on this point. [II 181-192] He also attempted to show that at the time of the personal appearance the board members were prejudiced against him because of his religion. This evidence was objected to and excluded. [II 194-195]

In his letter to the board of appeal Tomlinson complained of the draft board's denying him the right to a full and fair hearing upon personal appearance. [II 37, 38, 40]

The question presented, therefore, is whether the trial court committed reversible error in excluding relevant and material evidence offered by appellant to establish a denial of a full and fair hearing upon his personal appearance before the local board.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

III.

The district court erred in denying the motion for new trial.

IV.

The district court committed reversible error in refusing the appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as required by due process of law, the act and the regulations.

V.

The district court committed reversible error in refusing appellant the right to testify about how he had been denied a full and fair hearing upon personal appearance by the local board.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 62 Stat. 609) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953).

POINT TWO

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The undisputed evidence showed that Tomlinson claimed classification as a minister of religion. This claim was in addition to his claim for classification as a conscientious objector.

It appeared that the board in considering the ministerial claim upon personal appearance did not follow the law or the regulations. It illegally imported into the law a false element or factor. The reliance upon this illegal basis as to what constitutes a minister of religion caused the board to disregard the law completely. It determined the ministerial claim for exemption upon irrelevant and immaterial standards. The board thus manufactured its own definition of a minister of religion and rejected the law. So doing it deprived appellant of the right to full and fair hearing.

It has been held that where local boards upon personal appearance failed to consider the ministerial claim of the registrant because of the fact that he did not attend a theological seminary or was not trained in the same manner as the orthodox ministers are trained the registrant has been deprived of a full and fair hearing upon personal appearance.—See *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. May 21, 1951).

The local board, therefore, denied appellant a full and fair hearing upon his claim for classification as a minister of religion. That the local board and the board of appeal may have properly denied the claim for exemption is immaterial. The question here is not one of classification or

whether the classification actually given was arbitrary, capricious and without basis in fact. The contention here is not that the ministerial claim was denied without basis in fact. It is that appellant has been denied his rights to a full and fair hearing upon his personal appearance.

The fact that the board of appeal reclassified appellant *de novo* is of no moment.—See *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *United States* v. *Romano,* 103 F. Supp. 597, 600 (S. D. N. Y., March 12, 1952); *United States* v. *Zieber,* 161 F. 2d 90, 93 (3d Cir.); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir.).

It is respectfully submitted, therefore, that the court below should have sustained the motion for judgment of acquittal on this ground.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

Section 6(j) of the act (50 U. S. C. App. § 456(j) 62 Stat. 609) provides for the hearing in the Department of Justice. *United States* v. *Nugent,* 346 U. S. 1, specifically held that, while the registrant was not entitled to be given the secret FBI investigative report, it was the duty of the Department of Justice to supply to the registrant a full and fair résumé of the secret report. This was not done by the hearing officer at the hearing in the Department of Justice.

Tomlinson did not ask for the summary of the FBI report, since it was unnecessary for him to do so. The Department of Justice has amended its regulations and now requires that a full and complete summary of the entire FBI report be given to the registrant at the hearing, re-

gardless of whether he requests it or not. This amendment of the regulations of the department and the change in practice is a confession of the department that before the *Nugent* decision it was unnecessary for the registrant to request a summary.

Even if the Court should conclude that it is necessary for a registrant to request a summary of the FBI report, appellant is nevertheless in position to claim that in this case it be produced. Nevertheless, in this case the appellant is in position to complain of the failure to make a full and fair résumé of the FBI report.

The hearing officer undertook to make a summary, despite the fact that appellant did not request it. His making a partial summary waived the requirement that Tomlinson request the adverse evidence. Since he undertook to make a summary of the FBI report it was his responsibility to make a full report.

The recommendation of the hearing officer to the Department of Justice was adverse. He advised the Department of Justice to recommend against the conscientious objector claim by Tomlinson. He suggested that Tomlinson be placed in a I-A-O classification. This classification denied the full conscientious objector status. It made Tomlinson liable for the performance of noncombatant service. Since the hearing officer recommended against the full conscientious objector claim it must be assumed that he relied on adverse and unfavorable evidence appearing in the file.

It was necessary, therefore, to make a full and fair résumé of the adverse evidence appearing in the secret FBI report.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* District of Connecticut, August 20, 1953 (opinion by Hincks, Chief Judge).

The court below should have sustained the motion for judgment of acquittal on this ground. Error was committed when the motion was denied.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the reports to be marked for identification and received as sealed exhibits after the trial court made an inspection of the exhibits. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial judge committed grievous error when he refused to permit the exhibits to be used as evidence. He merely received the exhibits and permitted them to be marked for identification and inspected them himself. He excluded them and permitted the exhibits to come before this Court in sealed form for the limited purpose of determining whether he was in error in excluding the exhibits.

The claim of privilege is applicable here. The Government waived its rights under the Order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI reports were found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as

the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard his judicial function in determining whether a full and adequate summary had been made of the secret investigative reports without receiving the secret reports into evidence and comparing them with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* District of Connecticut, decided by Judge Hincks August 20, 1953.

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of them upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

POINT FIVE

The trial court committed reversible error in excluding relevant and material testimony offered by appellant for the purpose of showing that he was denied a full and fair hearing by the local board upon his personal appearance contrary to the regulations.

Tomlinson attempted to give evidence to show that he was denied the right to discuss his classification, point out material in the file that he believed had been overlooked by the board and submit new and additional evidence. This testimony was excluded by the trial court on the theory that nothing could be added to the file.

The trial judge erroneously overlooked the fact that this was an oral hearing. He assumed illegally that a memorandum and summary of the draft board constituted a full and complete record of everything that took place upon the personal appearance, contrary to the decision of this Court in *Dickinson* v. *United States,* 203 F. 2d 336 (March 9, 1953).

It is relevant to give oral evidence as to what took place upon the personal appearance. (*United States* v.

Zieber, 161 F. 2d 90, 93 (3d Cir.)) Appellant was entitled to show that he was denied a full and fair hearing upon his personal appearance by the local board. The decisions to this effect are legion; it is sufficient to cite only two: *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir.).

It is plain, therefore, that the trial court committed a grievous error in excluding this very vital and material evidence. The judgment of the court below should be reversed for this error alone, in event the Court does not conclude to reverse and order the district court to enter a judgment of acquittal.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of Title I of the Universal Military Training and Service Act of 1951 (50 U. S. C. § 456(j)), provides, in part, as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

Section 1622.14 (a) of the Selective Service Regulations (32 C. F. R. § 1622.14 (a)) provides:

> "In Class I-O shall be placed every registrant who would have been Classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously

> opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is not one iota of documentary evidence that in any way disputes the appellant's proof submitted showing that he was a conscientious objector. The statement of facts made by the hearing officer of the Department of Justice and the summary of the FBI investigative report do not contradict but altogether corroborate the statements made by the appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscientious objector when first denied by the appeal board, pursuant to 50 U. S. C. App. § 456(j). If there were any adverse evidence, certainly agents of the FBI in their deep and scrutinous investigation would have turned it up and produced it to the hearing officer to be used against the appellant. The summary supported the appellant's claim.

There is no question whatever on the veracity of the appellant. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact, but is one of law. The law and the facts irrefutably es-

tablish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

A decision directly in point supporting the proposition made in this case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector) are arbitrary and capricious is *United States* v. *Relyea,* No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

> "I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed

copy of the stenographer's transcript of the decision rendered by Judge McNamee will be handed up at the oral argument.

A similar holding was made by United States District Judge Murray in *United States* v. *Goddard,* No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

> " . . . after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head* v. *United States,* 199 F. 2d 337 (10th Cir.), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case that impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious group that Tomlinson belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Tomlinson was not impeached in his good faith.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do noncombatant military service. All of his papers and every document sup-

plied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscientious objector who was willing to perform noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to do noncombatant military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The appeal board makes no explanation whatever of its reasons for rejecting the claim that appellant be placed in Class I-O as a conscientious objector to participation in both combatant and noncombatant military service. Certainly if there were anything in the file to indicate that appellant was willing to do noncombatant military service, the hearing officer and the Department of Justice would have found it and relied upon it.

The appeal board, without any grounds whatever, compromised appellant's claim for total conscientious objection and awarded him only partial conscientious objector status. This was directly contradictory to the testimony that appellant had given to the local board after the case was returned to the local board by the appeal board for further investigation. Appellant explicitly stated in his papers, as well as upon the special examination by the local board for the appeal board, that he would not even perform civilian work and that he objected to going into the army. He even stated that he would not serve as a chaplain in the armed forces.

It was arbitrary for the appeal board to grant only part of appellant's claim and his testimony and reject the balance. The board of appeal classified appellant as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by the appellant.

The appeal board should have accepted the appellant's claim for exemption as a total conscientious objector or rejected completely his claim to be a conscientious objector. The appeal board had no authority to compromise his claim. Either he was telling the truth and was entitled to a I-O classification or else he was telling a lie and deserved a I-A classification. If the appeal board demurred to his evidence and the report of the hearing officer, it accepted the facts and made a determination that was without any basis in fact, arbitrary and capricious.

In this case the undisputed file showed that the appellant believed in the Supreme Being, that his religious duties were higher than those owed to the state, that he opposed participation in war because of them and that they were not the result of political, sociological or philosophical training but were religious beliefs. This brought the appellant clearly within the definition of a conscientious objector appearing in the act and the regulations.

There are many other grounds why the denial of the conscientious objector status is arbitrary, capricious and without basis in fact. These are argued extensively under Question One in the brief for appellant filed in *White* v. *United States,* No. 13,893, the companion case to this one, at pages 10-11, 14-33. Reference is here made to that argument as though copied at length herein. It is proper to make this reference because the two cases are heard here consecutively. They were tried by the same judge. They were tried consecutively. They appealed together. It is proper, therefore, to consider here the argument made in that case since the facts are identical to the facts in this case.

The position of the appellant on this point is eloquently argued by the opinion in *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. May 28, 1953). Reference is made to the entire opinion. See also *United States* v. *Pekarski,* — F. 2d — (2d Cir. October 23, 1953); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Konides,* Criminal

No. 6216, United States District Court, District of New Hampshire, March 12, 1952; *United States* v. *Konides,* Criminal No. 6264, United States District Court, District of New Hampshire, June 23, 1953, Honorable Peter Woodbury, Circuit Judge, sitting as district judge by special designation. Copies of these unreported decisions accompany this brief.

It is respectfully submitted that the denial of the conscientious objector claim is without basis in fact, arbitrary and capricious.

POINT TWO

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The memorandum made by the local board showed the reason why the local board, upon personal appearance, refused to listen to Tomlinson or consider his claim for classification as a minister of religion. The memorandum shows that Tomlinson was denied a full and fair hearing before the board. The board had reached the conclusion that a registrant was required by law to attend a theological seminary before he was eligible to be classified as a minister of religion. As a result of this the evidence offered by Tomlinson upon the personal appearance was rejected.

In his papers Tomlinson had shown that he had satisfactorily pursued the course of study prescribed by Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. He showed that he had completed the training for the ministry prescribed by the organization of Jehovah's Witnesses. He showed in his papers that he was a minister.

The law did not require that he go to a theological school or attend a divinity school. His attendance at the Watchtower school was sufficient. He showed that he had a knowledge of the Bible and was apt to teach and preach as a minister. The organization permitted him to teach and preach as a minister. This was an ecclesiastical determination as to his schooling and qualifications. This determination could not be questioned by the board or by the courts.

Appellant's former background and schooling for the ministry cannot be questioned. This also is armored completely by an ecclesiastical determination of Jehovah's Witnesses that was binding upon the draft board. It is conclusive. It can be questioned neither by the Government nor by the courts.

Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when this act was brought before Congress. He said:

> "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle."—86 Cong. Rec. 10589-10590.

There is nothing in the terms of the act or the regulations that authorizes the local board to prescribe that registrants must attend theological seminaries or divinity

schools before they can be considered to be ministers. The above quotation by Senator Tom Connally on the floor of the Senate indicates that Congress intended that the schooling and background of ministers of religion should not be inquired into by the members of the draft boards.

To permit the draft boards to pry into the schooling of ministers and compare the schooling of one with that of another would allow the draft boards to set themselves up as religious hierarchies. It would permit discrimination among the various religions and between different ministers registered with the local board. Freedom of religion and the spirit of toleration in this country completely forbid such a view.

The hearing given by the local board to the appellant upon his personal appearance did not meet the requirements of the law. The local board did not comply with Section 1622.1 of the regulations. (32 C. F. R. 1622.1(d)) This regulation provides:

> "(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

It has been held that whenever a draft board inquires into and considers the religious training and background of the registrant the regulations are violated. These courts have held that when draft boards hold that it is necessary for a registrant to attend a theological seminary or divinity school as a prerequisite to claiming the exemption as a minister of religion there is a denial of a full and fair hearing upon the personal appearance.—*Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. May 21, 1951).

It is respectfully submitted that the local board, upon the occasion of the personal appearance in this case, de-

prived Tomlinson of his right to a full and fair hearing. Due process of law was denied. For this reason it was the duty of the court below to grant the motion for judgment of acquittal. The order overruling the motion and the judgment of conviction, therefore, constitute reversible error.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

The record in this case shows that Tomlinson did not voluntarily request the hearing officer to supply any adverse evidence. The undisputed evidence shows, however, that the hearing officer undertook to make a full and fair résumé of the adverse evidence appearing in the report. It cannot be contended, therefore, that appellant was not entitled to a full and fair résumé of the adverse evidence because he did not request it. He did not waive the right to have the full and fair résumé. The reason is that the hearing officer waived the requirement that he request the unfavorable evidence specifically at the hearing.

Since the hearing officer undertook to give a full and fair résumé voluntarily he assumed the responsibility of giving that type of summary required by the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1.

Appellant did not ask for the entire FBI report. It is true that he did not use the word "résumé" or the word "summary." He asked that he be supplied the unfavorable or adverse evidence or be given the general nature of it. He wanted to know all the evidence that was unfavorable against him. The fact that he may not have used the word "résumé" or "summary" was not enough to defeat his rights to be confronted with the unfavorable evidence. He asked

for all the regulations and the Department of Justice would allow at the time.

The Government may place stress upon the fact that the appellant in this case did not request that he be supplied a summary of the FBI report. To begin with, the Department of Justice procedure forbade the production of any such summary. There was no provision in the Department of Justice regulations for giving a summary. The procedure providing the summary of the FBI report was not established by the Government until on or about September 1, 1953. This was the first time there ever was any procedure authorizing a registrant to get a summary of the FBI report. Since it was impossible for the registrant to obtain a summary of the FBI report from the hearing officer and, inasmuch as the Department of Justice regulations prohibited the giving of such summary at the time this case was heard by the hearing officer, the argument of the Government (that the appellant failed to request a summary) should be rejected.

It should be remembered that the Supreme Court held in the *Nugent* case that the registrant was entitled to a summary of the FBI report. The notice sent out to registrants stated they could get the general nature of the unfavorable evidence. Since the notice did not give them the right to have a summary of the evidence (which the *Nugent* case held they were entitled to), failure to comply with the notice sent was not a waiver of the right to insist on the subpoena duces tecum in the court below.

Regardless of whether the request was made (for the summary of the unfavorable evidence) it is still the duty of the hearing officer to give the registrant a summary on his own motion. That is positively required now by the regulations of the Department of Justice. The recent amendment to the regulations (requiring a summary of the FBI report to be made for the registrant) is a concession by the Department of Justice that the procedure which it followed before the *Nugent* decision and in this case does not

meet the requirement of due process of law and Section 6(j) of the act.

In *United States* v. *Bouziden,* 108 F. Supp. 395 (D. C. W. D. Oklahoma November 13, 1952), it was held that the registrant was entitled to have a summary of the FBI report produced at the hearing. The court held, however, that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant. It was said:

> "As directed by the statute the Department of Justice made an appropriate inquiry. Then the hearing was held with the registrant for the purpose of determining the character and good faith of the objections of the registrant to his classification. The undisputed evidence is that no mention was ever made by the hearing officer of the unfavorable information contained in the Federal Bureau of Investigation report. No opportunity was given to rebut this unfavorable information. . . .
>
> " . . . The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?"

The court in *United States* v. *Bouziden,* 108 F. Supp. 395 (W. D. Okla. 1952), distinguished the decision in *Imboden* v. *United States,* 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made

about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States* v. *Annett,* 108 F. Supp. 400 (W. D. Okla. 1952); reversed on other grounds, 205 F. 2d 689 (10th Cir.) June 26, 1953.

In *Eagles* v. *Samuels,* 329 U. S. 304, the Supreme Court approved the use of the theological panel. The panel made a report which was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations."—(329 U. S., at p. 313). See also *Degraw* v. *Toon,* 151 F. 2d 778 (2d Cir.); *Levy* v. *Cain,* 149 F. 2d 338 (2d Cir); *United States* v. *Balogh,* 157 F. 2d 939 (2d Cir.); judgment vacated, 329 U. S. 692; affirmed on other grounds, 160 F. 2d 999.

This Court has long ago held that a person appearing before an administrative agency is entitled to be informed of any adverse evidence that may be used against him. *Chen Hoy Quong* v. *White,* 249 F. 869 (9th Cir. 1918), is one of the first cases decided by this Court on this point. In that case the Court held that the failure to disclose a secret and confidential communication relied on by an immigration hearing officer violated the procedural rights to due process of law. This Court set aside an order denying an alien admission to the United States on the grounds that he was not given a full and fair hearing.—See also *Bachus* v. *Owe Sam Goon,* 235 F. 847, 853; *Chin Ah Yoke* v. *White,* 244 F. 940, 942; *Mita* v. *Bonham,* 25 F. 2d 11, 12 (9th Cir.); *Ohara* v. *Berkshire,* 76 F. 2d 204, 207 (9th Cir.).

Even where the facts are actually known to the hearing officer (which is not the case here) the administrator cannot

base his decision or recommendation upon it.—*Baltimore & Ohio R. Co.* v. *United States,* 264 U. S. 258 (permitting a railroad to acquire terminal roads); *Southern R. Co.* v. *Virginia,* 290 U. S. 190, 198; *Market St. Ry.* v. *R. Comm'n of California,* 324 U. S. 548, 562.

In *Degraw* v. *Toon,* 151 F. 2d 778 (2d Cir.), a draft board order was held to violate due process. The board considered evidence that damaged the registrant. It was a letter from two members of the advisory board. The court held that the opportunity to know and rebut damaging evidence goes to the heart of the controversy.—See also *United States* v. *Kowal,* 45 F. Supp. 301 (D. Del.).

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States* v. *Ju Toy,* 198 U. S. 253, 263) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company,* 227 U. S. 88, 91-92.) The Supreme Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177, 182.

It has been held that procedural due process requires that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial.

> "If that were not so a complainant would be helpless for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."—Mr. Justice Cardozo in *West Ohio Gas Co.* v. *Public Utilities Comm'n,* 294 U. S. 63, 68, 69.

Another important case on this subject is *Morgan* v. *United States,* 304 U. S. 1. That case presented a question on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. §§ 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play."—304 U. S., at pages 18, 22. See also *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329, 335-336.

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, it was held that the suppression or omission of evidence did not allow a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S., at 464.

In *United States* v. *Abilene & S. Ry. Co.,* 365 U. S. 274, 290, it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93.

The act and regulations make the recommendations of the Department of Justice to the appeal board merely advisory. They may be rejected by the appeal board. The appeal board may classify a registrant as liable for training and service in the armed forces when the Department of Justice recommends that he be classified as a conscientious objector, or vice versa. The Government argues that, because of this advisory nature of the recommendation, the Department of Justice can successfully refuse to give the registrant due process of law. The Government argues that it is not bound to place all the evidence in the file as the draft board is required to do, purely because the report is advisory in nature.

It is true that the investigation and recommendation of

the Department of Justice are merely advisory. This does not make the use of the illegal FBI report and the nondisclosure of the names of the informants harmless error. The report was relied on. Were it not for the adverse testimony of anonymous witnesses the claim for conscientious objector classification would not have been denied.

It cannot be said that it is harmless error when the rights of the registrant here were denied by the use of the FBI report by the hearing officer and the appeal board.

The FBI report was embraced, accepted and adopted by the appeal board. The unconstitutional procedure of the Department of Justice was adopted as the unconstitutional procedure of the Selective Service System. The appeal board made the invalid proceedings its own. Since the order to report is based on proceedings had before the Department of Justice, the use of the report by the draft boards vitiated the entire proceedings.

It is harmless if the report of the department is against the registrant and the appeal board grants the conscientious objector status. But when the appeal board accepts the recommendation to deny the status claimed by the registrant an entirely different situation is presented. The hearing officer has and relies on the report of the FBI. The Attorney General, making the recommendation to the appeal board, relies on the report of the hearing officer which is based on the FBI report. The Attorney General also has before him in making the recommendation the FBI report. He tests the report of the hearing officer with it. His recommendation is based not only on the report of the hearing officer, but also on the FBI secret police report. The board of appeal in more than ninety cases out of a hundred relies on the recommendation of the Department of Justice especially when the recommendation is adverse. In this case the board of appeal accepted and adopted the recommendation of the Department of Justice based mainly on the FBI report.

It is then only proper, necessary, fair, constitutional

and in compliance with due process of law that the summary of the adverse evidence gathered and recorded by the Federal Bureau of Investigation be given to appellant. It was relied on by the hearing officer. The hearing officer's report was relied on by the Department of Justice in making its recommendation to the appeal board and the appeal board relied on the recommendation supported by the FBI report. By all principles of fairness this evidence ought to be made available to the registrant on his trial. Without being provided the summary of the FBI report the registrant is denied the right to show that there is no basis in fact for the determination made by the appeal board based on the recommendations made by the Department of Justice and the hearing officer on the conscientious objector claim of the registrant.—*Estep* v. *United States,* 327 U. S. 114; *Kwock Jan Fat* v. *White,* 253 U. S. 454.

The error and harm produced by not giving a summary of the FBI report can be demonstrated by an analogy. There are certain types of judicial proceedings where the jury verdict is merely advisory. If misconduct of counsel, the jury or the court in violation of constitutional rights occurs in a trial where the verdict is merely advisory, it certainly would be ground for a new trial and reversal on appeal if the unconstitutional proceedings before the jury resulted in the verdict which was accepted by the trial court. This is what happened here. The adverse verdict against the registrant was accepted by the appeal board. The unconstitutional trial before the hearing officer invalidated the proceedings before the appeal board when the Department of Justice recommendation, adopting the hearing officer's report, was followed by the appeal board.

Suppose an attorney, during a trial before a jury in a case where the verdict was advisory, handed to the jury an exhibit that had been excluded from evidence. Also assume that the adversary did not learn of this until after entry of judgment. Putting aside the liability of the attorney for contempt of court, would it be doubted that the

verdict and judgment would be set aside even if the verdict were advisory? The same situation exists here.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano,* 103 F. Supp. 597 (S. D. N. Y. 1952)) The absence of the summary of the FBI report from the record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire selective service chain useless, void and of no force and effect. The Supreme Court held in *Kessler* v. *Strecker,* 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of Justice which has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam,* 102 F. Supp. 128 (D. W. Va. 1951). In that case the court said:

> "Under these statutory provisions, the hearing, report, and recommendation of the Department of Justice is an important and integral part of the conscription process for the protection of both the government and the registrant. The defendant had the right to have a fair hearing and a non-arbitrary report and recommendation by the Department of Justice to the appeal board.

> "It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant."

This quotation was made and approved in *United States* v. *Bouziden,* 108 F. Supp. 395 (D. W. D. Okla. 1952). It is respectfully submitted that the fact that the act and regulations make the recommendation advisory does not prevent the broken link from ruining the required continuously legal chain.

The making of the report and recommendation by the Department of Justice to the appeal board is after the hearing in the Department of Justice which the registrant attends. Appellant had no opportunity to see the report and recommendation of the Department of Justice until after his conscientious objector claim had been denied by the appeal board. The report and recommendation is sent directly to the appeal board. The registrant never sees this report before the appeal board determination. He has no opportunity to answer the report before the final determination by the appeal board. The making of the report and recommendation to the appeal board, wherein reference is made to the FBI report, does not make the report as available to the registrant as to the appeal board. The appellant was entitled to have this notice sent to him before the final determination by the appeal board. It is therefore erroneous for the Government to argue that the adverse evidence in the FBI report was made available to the appellant. It was not made available until it was entirely too late for him to do anything about the appeal board determination.

The appellant had the right to see his file after the ap-

peal board finished with and returned its denial of his conscientious objector claims. But this was entirely too late because there was no chance for the appellant to get the appeal board to reconsider his classification.

A speculative argument is made by the Government. It is said that the appeal board acted only on the adverse evidence of the FBI report which is referred to in the report and recommendation of the Department of Justice. The report and recommendation of the Department of Justice to the appeal board never attempts to summarize the FBI report. It merely refers to the FBI report without specifying what part of the report the Department of Justice relies upon. The fact that the appeal board follows the Department of Justice recommendation and denies the conscientious objector status requires the court to speculate as to just what the appeal board did rely upon. Speculation may not be indulged in by the court in a criminal case.—*United States* v. *Alvies,* 112 F. Supp. 618, at page 624; *Estep* v. *United States,* 327 U. S. 114, at pages 121-122.

It is presumed that the appeal board relied on the report and recommendation of the Department of Justice. Since the Department of Justice relies on the entire FBI report, it is necessary to conclude that the appeal board, therefore, is forced to rely on the entire report without seeing it since it adopts the report and recommendation of the Department of Justice.

It is respectfully submitted that the failure on the part of the hearing officer to give a full and fair résumé and summary of the adverse evidence appearing in the FBI report denied appellant due process of law. The denial of the full and fair hearing destroyed the validity of the draft board proceedings. The motion for judgment of acquittal should have been granted. The overruling of the motion and the conviction of the court below constitutes reversible error.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the reports to be marked for identification and received as sealed exhibits after the trial court made an inspection of the exhibits. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The secret reports of the FBI made in the investigation of the conscientious objector claim of appellant were subpoenaed. Upon the trial they were offered in evidence by the appellant. The trial court excluded the documents and forbade them to be received into evidence. It ordered them sealed and marked for identification so that the bill of exception on the ruling denying admission of the documents into evidence could be preserved for this Court. The appellant moved to inspect the documents and requested the court to receive them as evidence on several occasions. This request was denied every time that it was made. The trial court found the documents to be material. It refused to allow them to go into evidence because it held the order of the Attorney General, No. 3229, made them confidential and forbade that they be received into evidence.

Under the decision of the Supreme Court of the United States in *United States* v. *Nugent,* 346 U. S. 1, it was held that the statute required the Department of Justice to make a fair, complete résumé or summary of all the FBI investigative report and give it to appellant. A résumé or summary was given to appellant on the hearing. A résumé or summary was made by the hearing officer to the Department of Justice.

The only way that the Court can determine whether the

summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the reports produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the Court. Unless and until this Court sees and examines the FBI report and also unless and until appellant sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The Court cannot discharge its judicial function and determine whether the summary required by the Supreme Court of the United States in *United States* v. *Nugent,* 346 U. S. 1, is fair and adequate unless and until the Court has actually seen and examined the secret FBI report. In fact appellant's rights are not preserved unless and until he has had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1, dealt only with the contention that the secret FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of *Nugent* v. *United States,* 346 U. S. 1, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the appellant are claimed to be confidential by the Attorney General's Order No. 3229 issued pursuant to 5 U. S. C. Section 22, they must

be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. § 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Supreme Court refused to compel the revealing of evidence that would endanger national security in the case of *United States* ex rel. *Knauff* v. *Shaughnessy,* 338 U. S. 537. But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

> "... Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* ..."

Mr. Justice Jackson in his dissent wrote:

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected

> and uncorrected. Cf. In re *Oliver,* 333 U. S. 257, 268. . . . Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."—338 U. S., at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty on the ground of mere administrative privilege without some good ground for it is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, at page 172. That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the defendant. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 of the Attorney General is sufficient to overcome the requirements of the Constitution, and "fair play." However, Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22.

That statute provides that the order shall not be in contravention of law. It has been shown that the due process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States* ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, at 469:

> ". . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske* v. *Comingore,* 177 U. S. 459."

In a concurring opinion, Mr. Justice Frankfurter said at page 472:

> "There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers."

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was ex-

pressed in the case of *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), by Judge Clark in a concurring opinion at page 139:

> "... but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces ..."

United States ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2.) It is the validity of the order, as construed and applied to the particular facts, that the Court is here concerned with.

The principle that distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company* v. *Nashville Coal Company,* 55 F. Supp. 65 (W. D. Ky.) as follows:

> "I do not believe that the rule or the statute is applicable to the present case. In both of the cases referred to the federal employee involved was called as a witness and declined to testify. That is essentially different from being a party to the suit where there is a contest between the plaintiff and the defendant involving property which the defendant has taken into his possession."

It has been repeatedly held that Order No. 3229 and 5 U. S. C. § 22 do not establish an inexorable privilege and command prohibiting disclosure of the FBI report in judicial proceedings. When it has become material in proceedings brought by the Government, it has been repeatedly held that the privilege was waived and the Government could

not successfully refuse to produce the report when demanded. It seems that when it became material in these administrative proceedings to determine the validity of the registrant's claim for classification as a conscientious objector, for the same reasons the FBI report must be produced. The citizen has the same rights to know the evidence against him before the administrative tribunal as when before the judicial tribunal. The administrative agency stands on no higher level before the Constitution than does the court.

> "A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a very material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator . . . another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' *Hurd* v. *People,* 25 Mich. 405."—*United States* ex rel. *Montgomery* v. *Ragen,* 86 F. Supp. 382, 387.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. § 22 have been distinguished in *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.). There the court said:

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> "However, none of these cases involved the prosecution of a crime consisting of the very mat-

> ters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the document may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The competence of the document has been established by sources outside the document itself. Under the act and regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.)). In that case the court said:

> "But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."

United States v. *Beekman,* 155 F. 2d 580 (2d Cir.), involved a prosecution for violations of the OPA regulations.

The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error. The court said:

> "We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

In *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

Department of Justice Order No. 3229, relied on by the Government in support of its position that it may not be required to produce the documents requested, gets its life from Section 22 of Title 5 of the United States Code. This section provides that the regulations must be "not inconsistent with law."

The regulation, as construed and applied by the Attorney General in this case, is invalid and "inconsistent with law" expressed in Section 1670.17 of the Selective Service Regulations (32 C. F. R. § 1670.17) and in the Federal Rules of Criminal Procedure, Rule 17 (c), as interpreted in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214. The rule is law and has the effect of an act of Congress. (*Beasley* v. *United States,* 81 F. Supp. 518, 527 (E. D. S. C. 1948)). A departmental regulation against disclosure must yield to an Admiralty Rule.—*O'Neill* v. *United States,* 79 F. Supp. 827, 830 (E. D. Pa. 1948). Order No. 3229 must also yield

to Section 13 (b) of the Universal Military Training and Service Act and Section 3 (c) of the Administrative Procedure Act.

In *United States* v. *Schine Chain Theatres,* 4 F. R. D. 108 (W. D. N. Y. 1944), it was held that the nondisclosure regulation of the Department of Justice "does not prevent the court from ordering the production of files of the Department of Justice in all cases. There may be certain of such files which are entirely privileged and others which are not."

In *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), Judge Augustus Hand said:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies, which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual."—163 F. 2d 133, at 138.

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. He said:

> "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S., at p. 172.

The determination of whether the information sought

is privileged is not to be made by the Attorney General. That question is to be determined by the court and not the Department of Justice. In *Zimmerman* v. *Poindexter,* 74 F. Supp. 933, 935 (Hawaii 1947), the court said the "clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court".

This point is further supported by the holding in *Griffin* v. *United States,* 183 F. 2d 990 (D. C. Cir.), where the court said:

> "However, the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and usable to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done. *Burger* v. *United States,* 205 U. S. 78, 88.' "—183 F. 2d, at p. 993.

Attorney General Clark recognized that the question of privilege is one for the court to decide rather than for the Attorney General when he, in his Supplement Number 2, June 6, 1947, which clarified Order No. 3229, among other things, wrote:

> "If questioned the officer or employee should state that the material is at hand and can be submitted

> to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed."

Recently, however, the Attorney General has instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Supreme Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. du Pont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100, said:

> "... and if ... in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions the revelation should be made."—244 U. S., at 103.

The same rule ought to apply in the determination of the privilege urged by the Government.

On the trial of this case the question arose as to whether the verbal communication by the hearing officer to the appellant upon the occasion of his hearing constituted "a fair résumé" of the evidence that was adverse appearing in the FBI reports.

The Court cannot determine whether the résumé given at the hearing is fair without inspecting the secret investi-

gative report. That report cannot be inspected unless it is subpoenaed and produced at the trial.

It is submitted that the FBI report was not privileged and that the constitutional rights of the registrant were violated when it was not produced and not allowed to be used in evidence at the trial by the appellant.

POINT FIVE

The trial court committed reversible error in excluding relevant and material testimony offered by appellant for the purpose of showing that he was denied a full and fair hearing by the local board upon his personal appearance contrary to the regulations.

In the court below Tomlinson attempted to give evidence for the purpose of showing that he was denied a full and fair hearing upon the personal appearance. Since the hearing on personal appearance was oral it was highly relevant and material to receive the evidence offered by Tomlinson. —*United States* v. *Zieber,* 161 F. 2d 90 (3d Cir. 1947); *Niznik* v. *United States,* 173 F. 2d 328 (6th Cir. 1949).

Oral evidence was, therefore, to be properly received from appellant on what occurred. Appellant attempted to show that he had been denied the right to discuss his classification, point out material in the file that had been overlooked and give new and additional evidence. These were rights guaranteed by Section 1624.2(b) of the Selective Service Regulations.

The trial court excluded the evidence. The reason for the exclusion was that the record could not be changed. The trial court erroneously relied upon *Cox* v. *United States,* 332 U. S. 442. It overlooked the fact that this Court had decided in *Dickinson* v. *United States,* 203 F. 2d 336 (March 9, 1953), that the memorandum made by the local board on personal appearance was not a full and complete record. It was, as this Court said, a mere summary or epitome of the evidence given by the appellant. Since the

draft board memorandum did not purport to give a true and full record of what occurred, it was proper and permissible for the appellant to give oral testimony. This evidence was not objectional as an attempt to alter the record. To begin with the record was incomplete. The second reason is that the hearing was oral. Under the law the appellant, the draft board members and other persons present could testify. The only way that the violation of the regulations could be established is by oral testimony. Compliance with the regulations can also be shown by oral evidence.

It is manifest that the trial court fell into error. The conclusion reached by the trial court is that the basis for the exclusion of the offered evidence was patently unsound. It was in contradiction to the usual practice followed in these district courts in the trial of draft cases where it is contended that there has been a violation of rights upon personal appearance.

The appellant was entitled to show or try to establish that his rights had been violated and that the doctrine of *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.), and *Bejelis* v. *United States,* 206 F. 2d 345 (6th Cir.), applied. Since he was denied this right to his prejudice by the trial court, reversible error was committed. Because of this error the case should be remanded and a new trial ordered in the event that this Court does not reach the conclusion that the trial court should have granted the motion for judgment of acquittal.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to grant the motion for judgment of acquittal. The appellant, in the alternative, requests the Court to remand the case for new trial because of the error of the trial court in excluding relevant and material evidence, the secret FBI investigative reports and the oral testimony offered

by the appellant as to what occurred on the personal appearance.

Respectfully,

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